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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF WASHINGTON

10 ALLIANCE FOR THE WILD
11 ROCKIES,

12 Plaintiff,

13 v.

14 UNITED STATES FOREST
15 SERVICE; VICKI
16 CHRISTIANSEN, Chief of the
17 Forest Service; KRISTIN BAIL,
18 Forest Supervisor for the
19 Okanogan-Wenatchee National
20 Forest; and GLENN
21 CASAMASSA, Regional Forester
22 for Region 6 for the U.S. Forest
23 Service,
24
25
26

Defendants.

NO. 2:19-cv-00350-SMJ

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

11/10/2020

With Oral Argument: 10:30 a.m.

LOCATION: Spokane

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- Exhibit 1- FWS Concurrence Letter (November 17, 1989) (from FOIA Response)
- Exhibit 2 - Memorandum of Understanding (April 27, 2014)
- Exhibit 3 - Draft Grizzly Bear Restoration Plan EIS (January 2017)
- Exhibit 4 - Notice of Termination (July 7, 2020)
- Exhibit 5 - Interagency Grizzly Bear Committee Taskforce Report- Grizzly Bear/
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I. INTRODUCTION

The United States Forest Service (Forest Service) recently approved the Mission Restoration Project (Mission Project) which authorizes extensive logging and prescribed burning in the Methow Valley Ranger District of the Okanogan-Wenatchee National Forest. Based on an analysis presented in an Environmental Assessment that was prepared by the Forest Service, the Forest Supervisor concluded that the Mission Project will not have any significant adverse environmental impacts.

The decision approving the Mission Project was arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law. Not only did the approval of this Project result in direct violations of the Okanogan Forest Plan, which in turn constitutes a violation of the National Forest Management Act (NFMA), 16 U.S.C. § 1600, *et seq.*, it also resulted in improper environmental review in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321. The Forest Service's failure to prepare an environmental impact statement (EIS) and violations of the Okanogan Forest Plan will harm plant, fish, and animal life and natural ecosystems in the Okanogan-Wenatchee National Forest.

In addition, the Forest Service's "not likely to adversely affect" determination for grizzly bears for the Project is arbitrary and capricious and violates the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et. seq.* The Forest Service failed to consider the

1 impacts to grizzly bears from road densities in the Project area and failed to disclose
2 road density calculations to the public.

3
4 Finally, on a broader scale, the Forest Service and Fish and Wildlife Service
5 (FWS) are obligated under 50 C.F.R. § 402.16(b) to reinstitute formal consultation for
6 the Okanogan National Forest Plan. When the previous consultation was performed for
7 the plan long ago in 1989, the Forest Service and FWS did not know or understand the
8 effects the Forest Plan would have on grizzly because 1) it did not know its status at the
9 time of consultation; and 2) new science strongly demonstrates that roads negatively
10 impact grizzly bears and emphasizes the importance of minimizing road densities. This
11 new information that was not available at the time of the 1989 consultation is critical
12 to the evaluation of the Forest Plan's effects on grizzly bears. The agencies must
13 reinstitute consultation under the ESA, 16 U.S.C. § 1531, for the Okanogan Forest Plan.

14 15 16 17 **II. LEGAL BACKGROUND**

18 19 **A. The National Forest Management Act**

20 The National Forest Management Act, 16 U.S.C. §§ 1600-1687, charges the
21 Forest Service with the management of national forest land, including planning for the
22 protection and use of the land and its natural resources. *Alliance for the Wild Rockies*
23 *v. U.S. Forest Serv.* 907 F.3d 1105, 1109 (9th Cir. 2018). Under NFMA, forest land
24 management occurs on two levels: (1) the forest level, and (2) the individual project
25
26

1 level. *Id.* at 1109 citing *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056
 2 (9th Cir. 2012).

3
 4 At the forest level, each planning unit of the National Forest system is managed
 5 under a “Land and Resource Management Plan,” which is commonly referred to as a
 6 “forest plan.” *Id.* See also 16 U.S.C § 1604. Forest plans are strategic documents
 7 describing the overall management direction for a national forest. *Id.* A forest plan
 8 describes the desired resource conditions across the planning unit and provides
 9 allocations, goals, objectives, standards, and guidelines for resource management to
 10 maintain or restore these desired resource conditions. *Id.* Specific logging projects, such
 11 as the Mission Project, must be consistent with the forest plan – the project must be
 12 carried out as directed by the goals, objectives, standards, and guidelines set forth in
 13 the forest plan. See 16 U.S.C. § 1604.

17 **B. The National Environmental Policy Act**

18 The National Environmental Policy Act of 1969, commonly known as NEPA, is
 19 “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a)
 20 (2006). Ultimately, NEPA ensures that an agency's approval of a project is a fully
 21 informed and well-considered decision. *Center for Biological Diversity v. U.S. Dept.*
 22 *Of Interior*, 563 F. 3d 466, 474 (D.C. Cir. 2009).

23 NEPA requires federal agencies “to the fullest extent possible” prepare an
 24 environmental impact statement (EIS) for every major Federal action significantly
 25
 26

1 affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).
 2 NEPA ensures that the agency will have available, and will carefully consider, detailed
 3 information concerning significant environmental impacts; it also guarantees that the
 4 relevant information will be made available to the larger public audience. *Blue*
 5 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)
 6

7
 8 An EIS must “provide full and fair discussion of significant environmental
 9 impacts and shall inform decisionmakers and the public of the reasonable alternatives
 10 which would avoid or minimize adverse impacts or enhance the quality of the human
 11 environment.” 40 C.F.R. § 1502.1. NEPA is intended to ensure that environmental
 12 concerns are integrated into the very process of agency decisionmaking. *Robertson v.*
 13 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Andrus v. Sierra Club*, 442
 14 U.S. 347 (1979).
 15

16
 17 Under NEPA, an agency must take a hard look at environmental impacts, which
 18 includes considering all foreseeable direct and indirect impacts, without improperly
 19 minimizing negative side effects. 40 C.F.R. § 1508.27; *Robertson*, 490 U.S. at 350;
 20 *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir.
 21 2009). An agency meets NEPA’s hard look requirement when it has made a reasoned
 22 evaluation of the available information and its method was not arbitrary or capricious.
 23 *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036 (10th Cir. 2014).
 24

25 Reasonable forecasting and speculation is implicit in NEPA and the courts must reject
 26

1 any attempt by agencies to shirk their responsibilities under NEPA by labeling any and
 2 all discussion of future environmental effects as "crystal ball" inquiry. *Center for*
 3 *Biological Diversity v. Bureau of Land Management*, 937 F. Supp. 2d 1140 (N.D. Cal.
 4 2013).

6 The matters which must be considered by the agency in the course of making its
 7 determination are governed by a rule of reason. *Harlem Val. Transp. Ass'n v. Stafford*,
 8 500 F.2d 328 (2d Cir. 1974). The "rule of reason" ensures that agencies determine
 9 whether and to what extent to prepare environmental impact statements based on the
 10 usefulness of any new potential information to the decision-making process.
 11 *Department of Transp. v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d
 12 60 (2004).

16 A threshold question in a NEPA case is whether a proposed project will
 17 "significantly affect" the environment, thereby triggering the requirement for an EIS.
 18 42 U.S.C. §4332(2)(C); *Blue Mountains Biodiversity Project*, 161 F.3d at 1212. "As a
 19 preliminary step, an agency may prepare an EA to decide whether the environmental
 20 impact of a proposed action is significant enough to warrant preparation of an EIS." *Id.*
 21 *citing* 40 C.F.R. § 1508.9. An EA is a "concise public document that briefly provide[s]
 22 sufficient evidence and analysis for determining whether to prepare an EIS or a finding
 23 of no significant impact." *Id.* To determine whether a proposed project will have
 24 "significant" impacts on the environment, an agency must evaluate, among other

1 things, “the degree to which the effects on the quality of the human environment are
 2 likely to be highly controversial.” 40 C.F.R. §§ 1508.27(b)(4); *Blue Mountains*
 3 *Biodiversity Project*, 161 F.3d at 1212.

5 If the agency decides not to prepare an EIS, it must provide a convincing
 6 statement of reasons in the EA to explain why the project's impacts are insignificant.
 7 *Blue Mountains Biodiversity Project*, 161 F.3d at 1212. Doubts about whether an
 8 environmental impact statement is required are resolved in favor of preparing one.
 9 *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581 (4th Cir. 2012).
 10 The preparation of an EIS is required whenever it can be fairly argued that the project
 11 may have a significant environmental impact, and this is so regardless of whether other
 12 substantial evidence supports the opposite conclusion. *Monsanto Co. v. Geertson Seed*
 13 *Farms*, 561 U.S. 139, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010); *Cold Mountain v.*
 14 *Garber*, 375 F.3d 884 (9th Cir. 2004), as amended, (Aug. 9, 2004).

18 This standard does not require the court to determine whether a challenged
 19 project will in fact have significant effects. *Blue Mountains Biodiversity Project*. 161
 20 F. 3d at 1212; *City of Davis v. Coleman*, 521 F.2d 661, 673–74 (9th Cir. 1975). It is
 21 enough for the plaintiff to raise substantial questions about whether the project will
 22 have a significant effect on the environment. *Id.* In making the determination of
 23 significance, it’s important to bear in mind that the most serious environmental effects
 24 of a project may not be obvious, and that the purpose of the EIS requirement is to ensure
 25
 26

1 that “to the fullest extent possible” agency decisionmakers have before them and take
 2 into proper account a complete analysis of the project's environmental impact. *City of*
 3 *Davis v. Coleman*, 521 F.2d at 673–74 citing *Calvert Cliffs' Coordinating Committee*
 4 *v. A.E.C.*, *supra*, 449 F.2d 1109, 1104 (D.C. Cir. 1971).

6 C. The Endangered Species Act

7
 8 The Endangered Species Act (ESA), 16 U.S.C. § 1531 et. seq., is designed to
 9 ensure that endangered species are protected from government action. Section 7 of the
 10 ESA requires the Forest Service, in consultation with FWS, “insure that any action
 11 authorized, funded, or carried out by such agency . . . is not likely to jeopardize the
 12 continued existence of any endangered species or threatened species” by evaluating the
 13 consequences of the proposed action a listed species. 16 U.S.C. § 1536(a)(2). The Ninth
 14 Circuit has described Section 7 as the heart of the ESA. *Karuk Tribe of California v.*
 15 *USFS*, 681 F.3d 1006, 1019 (9th Cir. 2012).

16
 17 The Forest Service must consult with the FWS for site-specific federal projects
 18 as well as for promulgation of land management plans and standards. *Pacific Rivers*
 19 *Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Only after the agencies comply
 20 with Section 7, can any activity that may affect the protected species go forward. *Id.* at
 21 1056-7. The Ninth Circuit holds that “the minimum threshold for an agency action to
 22 trigger consultation with FWS is low....” *Western Watersheds Project v.*
 23
 24
 25
 26

1 *Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). The threshold is whether an activity
 2 may affect a listed species that may be present.
 3

4 “Once an agency is aware that an endangered species may be present in the area
 5 of its proposed action, the ESA requires it to prepare a biological assessment. . . .”
 6 *Thomas v Peterson*, 753 F. 2d 754, 763 (9th Cir. 1985); 16 U.S.C. § 1536(c)(1). The
 7 “may be present” threshold includes migratory species that may be present “at some
 8 point” within the action area, and the standard does not require confirmation that
 9 species are “actually known or believed to occur” in the area. 51 Fed. Reg. 19926,
 10 19946 (June 3, 1986).
 11

12
 13 Additionally, “any possible effect, whether beneficial, benign, adverse, or of an
 14 undetermined character, triggers the formal consultation requirement.” *Kraayenbrink*,
 15 632 F.3d at 496 (citations omitted). As the Ninth Circuit has stated, “where, as here, a
 16 plaintiff alleges a procedural violation under Section 7 of the ESA, as opposed to a
 17 substantive violation under Section 9, the plaintiff need not prove that a listed species
 18 has in fact been injured.” *Karuk Tribe*, 681 F.3d at 1028. Instead, the “plaintiff need
 19 only show . . . that the challenged action ‘may affect’ a listed species. . . .” *Id.*
 20
 21

22 If Section 7 consultation is completed, but later becomes inadequate, the
 23 agencies must reinitiate consultation. 50 C.F.R. § 402.16 (2015). “Reinitiation of
 24 formal consultation is required ... [i]f new information reveals effects of the action that
 25 may affect listed species or critical habitat in a manner or to an extent not previously
 26

1 considered.” *Id.* § 402.16(b). “If the data is new and the new data may affect the
 2 jeopardy or critical habitat analysis, then the FWS was obligated to reinitiate
 3 consultation pursuant to 50 C.F.R. § 402.16.” *Gifford Pinchot Task Force v. U.S. Fish*
 4 *and Wildlife Serv.*, 378 F.3d 1059, 1077 (9th Cir. 2004). The duty to reinitiate
 5 consultation lies “with both the action agency and the consulting agency.” *Salmon*
 6 *Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

9 If an agency has failed to conduct necessary consultation on a forest plan, the
 10 timber sales that implement that forest plan must be enjoined. *Pacific Rivers*, 30 F.3d
 11 at 1057. Moreover, “the activity cannot go forward even after consultation is initiated
 12 if it represents an irreversible and irretrievable commitment of resources as prohibited
 13 by §7(d).” *Id.* at 1057 n.15. In the Ninth Circuit, “timber sales constitute per se
 14 irreversible and irretrievable commitments of resources under §7(d) and thus could not
 15 go forward during the consultation period.” *Id.* at 1057; *see also Lane County Audubon*
 16 *Soc. v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (“the individual sales cannot go
 17 forward until the consultation process is complete on the underlying plans . . .”).

21 III. STANDARD OF REVIEW

22 The APA “sets forth the procedures by which federal agencies are accountable
 23 to the public and their actions subject to review by the courts.” *Dept. of Homeland*
 24 *Security v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1905 (2020). It requires agencies
 25 to engage in “reasonable decisionmaking.” *Id.* Under the APA, a court shall set aside
 26

1 an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not
 2 in accordance with law,” “short of statutory right,” or found to be “without observance
 3 of procedure required by law.” 5 U.S.C. § 706(2)(A), (C), (D); *Klamath Siskiyou*
 4 *Wildlands Ctr. v. Boody*, 468 F.3d 549, 554 (9th Cir. 2006). The court’s review of an
 5 agency’s procedural compliance with statutory norms is an exacting one. *Natural*
 6 *Resources Defense Council, Inc. v. Securities and Exchange Commission*, 606 F.2d
 7 1031 (D.C. Cir. 1979).

8
 9
 10 Judicial review under this standard is to be “searching” and “careful” and should
 11 determine whether the decision was based upon a consideration of the relevant factors.
 12
 13 *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). An agency
 14 action should be overturned when the agency has “relied on factors which Congress
 15 has not intended it to consider, entirely failed to consider an important aspect of the
 16 problem, offered an explanation for its decision that runs counter to the evidence before
 17 the agency, or is so implausible that it could not be ascribed to a difference in view or
 18 the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto.*
 19 *Ins. Co.*, 463 U.S. 29, 43 (1983). *See also Dept. of Homeland Security*, 140 S. Ct. at
 20 1905. An agency’s position that is contrary to the clear language of a forest plan is not
 21 entitled to deference. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953,
 22 962 (9th Cir. 2005); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372,
 23 1377 (9th Cir. 1998).

IV. ARGUMENT

A. The Mission Project Is Inconsistent with Forest Plan Standards That Require Protection of Deer Habitat.

The Mission Project should be vacated on the grounds that it is inconsistent with Standard and Guidelines in the Okanogan Forest Plan (Forest Plan) that were adopted for the purpose of maintaining deer winter range and fawning habitats.

The NMFA requires that all site-specific projects and activities in the Okanogan Forest be consistent with the Forest Plan. *Alliance for the Wild Rockies*, 907 F.3d at 1109 citing 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e) (1998); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F. 3d at 961; *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002). The long-term plans and objectives for the Okanogan National Forest that are established by the Forest Plan must be implemented at the project level. *Alliance for the Wild Rockies*, 907 F.3d at 1119. A site-specific project must comply with the standards set forth in the governing Forest Plan. *Id.* at 1113.

The Forest Plan has identified separate Management Areas (MA's) in the Okanogan Forest that each have different priorities and purposes. For example, Management Area 25 (MA-25) must be managed for intensive timber management and a high level of timber production. AR-01683. MA-24 must be managed to provide for minerals exploration. AR-01681. MA-26, which is relevant here, must be managed

specifically for the purpose of maintaining deer habitat. AR-01663, 01687. The goal for MA-26 is: “Maintain deer winter range and fawning habitats to provide conditions which can sustain optimal numbers of deer indefinitely, without degrading habitat characteristics such as forage, cover, and soil.” AR-01687. The Forest Plan’s desired future condition for MA-26 is:

Desired Future Condition: Deer winter ranges will be managed to provide optimum habitat conditions for deer by maintaining well distributed winter thermal and snow/intercept thermal cover and foraging areas. Wood product outputs will be provided at a reduced level. Winter recreation activities will be encouraged outside of deer winter range. Access to these areas will be provided on designated through routes to reduce disturbance to wintering deer. Motorized access will be restricted to maintain wildlife habitat effectiveness at higher levels. ...

Deer winter ranges are an essential part of deer habitat since animals concentrate on these areas from well dispersed summer ranges. In the Methow Valley winter ranges are generally found below 5000 feet elevation, but east of the Okanogan River on the ‘North-half,’ deer winter range is found where coniferous timber stands provide the necessary thermal cover. The spatial distribution of cover and forage areas on the winter ranges is very important to reduce the distances deer are required to move between the habitat components.

AR-01687.

The Forest Plan provides specific standards and guidelines for purposes of achieving the goal and desired conditions set forth above. Standard MA26-20A requires: “Scheduled and non-scheduled timber harvests shall be designed to perpetuate deer habitat and to address current habitat needs.” AR-01688. Standard MA26-20I requires: “Operating season for logging and post-sale operations shall be restricted

1 when necessary to protect roads, soil, water, deer winter range, and fawning areas.”
 2 AR-01689. Standard MA26-20J requires: “To protect deer during winter, operations
 3 shall be prohibited December through March except east of the Okanogan River.” *Id.*
 4 A broader forest-wide standard (applicable to all MAs), Standard 6-8, requires the
 5 Forest Service: “Manage disturbing activities so they occur outside of critical periods
 6 to protect, wildlife (*e.g.*, identified parturition areas, nesting sites, wintering areas).”
 7
 8 AR-01615.
 9

10 The Mission Project, which is west of the Okanogan River, proposes to conduct
 11 logging operations during the winter in violation of these standards. AR-14840. The
 12 EA states that “commercial thinning would be required under winter conditions in some
 13 areas to prevent further soil disturbance. Winter soil conditions allow for protection of
 14 detrimentally impacted soils from past management while allowing the area to be
 15 thinned by mechanized harvesters to achieve project goals.” AR-14840. The Draft EA
 16 states: “[O]ne method to protect sensitive ash-capped soils from compaction, rutting,
 17 displacement or other disturbances is to operate during the winter when the ground is
 18 frozen and snow-covered.” AR 12478. The final approval decision states that much of
 19 the first contract for commercial thinning treatments will “most likely be winter
 20 harvested.” AR-16788. The second contract “could be harvested in either summer or
 21 winter.” *Id.*
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1 Because the Mission Project both proposes commercial and noncommercial
 2 logging west of the Okanogan River during the winter and specifically relies on winter
 3 logging to protect soils, the Mission Project violates the standards quoted above in the
 4 Forest Plan. None of the Project documents (the Draft EA, The Final EA or the Final
 5 Decision) address this issue.
 6
 7

8 **B. The Mission Project is Inconsistent with Standards that Prohibit**
 9 **Snowplowing Forest Road 43.**

10 The USFS fails to demonstrate compliance with Standards and Guidelines 17-6
 11 and 17-8 (Access) and Management Area Prescription MA14-17B. Standards 17-6 and
 12 17-8 prohibit snowplowing certain portions of Forest Roads 43 and 4300300 and
 13 require that those portions be closed to motorized wheeled traffic from December 1 to
 14 April 1. AR-01631. MA14-17B prohibits access by motorized vehicles on deer winter
 15 range December through March, except through designated through routes. AR-01665.
 16
 17

18 The Draft EA states: “In this project, winter operations would require
 19 snowplowing Forest Road 43 and winter access on deer winter range, which would
 20 require amending Standards and Guidelines.” AR-12478. While these proposed Forest
 21 Plan Amendments were proposed in the Draft EA, the Final EA states that these
 22 amendments were determined to be “unnecessary,” but did not explain why. AR-
 23 14760. The USFS failure to demonstrate that the Mission Project complies with
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Standards and Guidelines 17-6 and 17-8 (Access) is a violation of NFMA. *Alliance for the Wild Rockies*, 907 F.3d at 1109.

C. The Forest Service Failed to Demonstrate Compliance with the Forest Plan's Soil Compaction Limit in Violation of NFMA.

To comply with NFMA, the Forest Service must develop soil quality standards that are incorporated into Forest Plans. Standard and Guideline 13-10 requires that “no more than 15 percent of an area shall be in a puddled, displaced, or compacted condition following completion of management activities.” AR-01626. Puddled, displaced, or compacted soil conditions are collectively referred to as “detrimental soil disturbance” or DSD. AR-14423; 14831. Under the methodology for determining soil impacts, the analysis “area” for soils encompasses the land within an individual treatment unit. AR-14422.

“Soil compaction” refers to “a reduction of soil volume, which results in alteration of soil chemical, physical, and biological properties and qualities. AR-15228. Soil compaction limits native plant growth, reduces soil biological activity and water infiltration, limits soil productivity, and reduces the resiliency of plant communities to climactic and biological changes over time. AR-14748. Timber harvest, road construction, fires, and other activities cause detrimental soil disturbance. AR-14427.

The Forest Service fails to demonstrate that the Mission Project complies with Standard 13-10. The Mission Restoration Project Soil Resources Report provides data

1 on the existing soil conditions that were found in 74 timber units within the Mission
2 Project area. Units 47, 53, 59, 78, and 79 have an existing condition of greater than
3 15% DSD. AR-14428-29. Ten other timber units within the Project area are very near
4 15%. *Id.*

5
6 The EA states that both the existing condition and future condition under
7 Alternative 2 are less than 15% average DSD. See AR-14835; 14838; 14843. However,
8 to reach this conclusion, the Forest Service inappropriately relied on an “average” of
9 DSD for the entire Project area instead of assessing the soil conditions in each “timber
10 unit.” AR-14838. Standard 13-10 applies to individual timber units, not the average of
11 the entire Project area. Considering that existing conditions reveal that more than 15
12 percent of the area in five different individual timber units are in a puddled, displaced,
13 or compacted condition now, and 10 other timber units are near that limit, the Forest
14 Service should have modeled the predicted DSD for each timber unit with the Mission
15 Project to assess consistency with Standard 13-10. Considering that the average DSD
16 with the Mission Project is higher than the average for the Non-Action alternative (4-
17 7% vs. 7-10%), it’s likely that there will be timber units that exceed the 15% limit
18 following completion of management activities with the Mission Project. The Forest
19 Service therefore cannot demonstrate compliance with this standard in violation of
20 NFMA. *Alliance for the Wild Rockies*, 907 F.3d at 1109.
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D. The Forest Service's Failure to Prepare an Environmental Impact Statement Violates NEPA.

In her Decision, the Forest Supervisor concluded that the Mission Project would not have any significant adverse effects on the quality of the human environment and therefore, an EIS was not required. AR-16802. The Forest Service's failure to prepare an EIS for the Mission Project was arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. § 706 for the reasons provided below.

1. The Forest Service inappropriately relied on delayed and uncertain mitigation and beneficial impacts to justify the FONSI.

The Forest Service erred when it relied on delayed and uncertain mitigation and/or beneficial impacts of the Mission Project to justify its conclusion that the Project will not have probable significant adverse environmental impacts. The conclusions of the Forest Supervisor with respect to the factors in 40 CFR § 1508.27 (see AR-16802-16805) were incorrect and did not accurately reflect the summary and analysis in the Environmental Assessment.

Mitigation measures can form the basis of a finding of no significant impact but those mitigation measures "must meet some minimal standards." *Wyoming Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005). The minimum standards include that "the

1 mitigation measures must be more than a possibility,” and that “the mitigation measures
 2 relied upon must constitute an adequate buffer so as to render such impacts so minor as
 3 to not warrant an EIS.” *Id.* (internal quotations and citations omitted). “Mitigation must
 4 ‘be discussed in sufficient detail to ensure that environmental consequences have been
 5 fairly evaluated.’” *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 citing *Carmel–By–*
 6 *the–Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir.1997). “[B]road
 7 generalizations and vague references to mitigation measures . . . do not constitute the
 8 detail as to mitigation measures that would be undertaken, and their effectiveness, that
 9 the Forest Service is required to provide.” *Id.* at 1081.

13 In *National Audubon Society v. Hoffman*, 132 F.3d 7 (2nd Cir. 1997), the court
 14 emphasized “the requirement that mitigation measures be supported by substantial
 15 evidence in order to avoid creating a temptation for federal agencies to rely on
 16 mitigation proposals as a way to avoid preparation of an EIS. That is to say, agencies
 17 should define ‘significance’ broadly and not rely on proposed mitigation measures as
 18 an excuse to avoid preparing an EIS.” *Id.* at 17. When the determination that a
 19 significant impact will or will not result from the proposed action is a close call, an EIS
 20 should be prepared. *Id.* at 13. That court also said:

24 Moreover, we think NEPA's policy goals require agencies to err in favor
 25 of preparation of an EIS when the proposed action is likely to have a
 26 significant environmental impact. Consequently, we agree with the
 district court that a party challenging the agency's decision not to prepare
 an EIS must show only that there is a substantial possibility that the action

1 may have a significant impact on the environment, not that it clearly will
 2 have such an impact. The Forest Service's determination that preparation
 3 of an EIS was not necessary, based on the record before it, was therefore
 4 arbitrary and capricious.

5 (internal citations omitted). In *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524
 6 F.3d 917, 935–36 (9th Cir. 2008), the court said: “We are not persuaded that even
 7 a sincere general commitment to future improvements may be included in the proposed
 8 action in order to offset its certain immediate negative effects, absent specific and
 9 binding plans. Although the record does reflect a general desire to install structural
 10 improvements where feasible, it does not show a clear, definite commitment of
 11 resources for future improvements.”
 12

13
 14 Where an environmental assessment relies on mitigation measures to reach a
 15 finding of no significant impact, that mitigation must be assured to occur and must
 16 “completely compensate for any possible adverse environmental impacts,” so that “the
 17 statutory threshold of significant environmental effects is not crossed and an EIS is not
 18 required.” *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v.*
 19 *Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982).
 20
 21

22 The Council on Environmental Quality (CEQ) addresses mitigation as follows:

23 Mitigation measures may be relied upon to make a finding of no
 24 significant impact only if they are imposed by statute or regulation, or
 25 submitted by an applicant or agency as part of the original proposal. As a
 26 general rule, the regulations contemplate that agencies should use a broad
 approach in defining significance and should not rely on the possibility of
 mitigation as an excuse to avoid the EIS requirement.

Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,038 (Mar. 23 1981).

If a proposal appears to have adverse effects that could be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation opportunities without altering the nature of the proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

Id.

The Mission Project authorizes mitigation and restoration activities that are necessary to avoid significant adverse impacts to fish and wildlife. The Forest Service depends upon them to support its FONSI. *See, e.g.*, AR-14829, 14830, 14934, 14937, 14959, 14961, 14969; 14810. Should the Mission Project commence, activities that have significant adverse environmental impacts would occur immediately, while the mitigation and beneficial restoration activities may occur some unspecified time in the future, if unspecified funding becomes available.

For example, new road construction will be implemented at the beginning of the Project as needed on all roads that would be used for timber hauling with resulting adverse effects from increased sediment delivery. AR-14762, 14809-14810. The Forest Service alleges that adverse impacts of road reconstruction and maintenance will be

1 mitigated by the beneficial impacts of road closure and decommissioning, stream
2 habitat improvements, and mitigation. Decommissioning of roads “involves the
3 stabilization and restoration of roads to a more natural state.” AR 15214. “Activities
4 used to decommission a road include activities such as reestablishing former drainage
5 patterns, stabilizing slopes, restoring vegetation, blocking the entrance to the road,
6 removing culverts, reestablishing drainage-ways, removing unstable fills, pulling back
7 road shoulders, scattering slash on the roadbed, or other methods designed to meet the
8 specific conditions associated with the unneeded road.” *Id.*

11
12 However, the EA states that the proposed “non-timber sale” activities “require a
13 level of investment that may not be possible within current or expected levels of
14 appropriations.” AR-15063. In other words, the EA states that it may not be possible to
15 fund the road closing/decommissioning activities, the beaver habitat enhancement, rock
16 armoring, culvert replacements, and other non-timber production activities. *Id.*

18
19 The EA states, “Road closure and decommissioning would be spread out over
20 the period of the project or after completion of the project depending on where and
21 when funding is available.” AR-14762. Similarly, the EA states that the replacement of
22 the bridge over West Fork Buttermilk Creek will “occur at a future date when adequate
23 funds become available.” AR-15105. Likewise, culvert replacements that are important
24 for fish passage and habitat connectivity are dependent on not-yet-available funding
25 and would occur at some unknown date in the future only if funding becomes available.
26

1 AR-15141. (“Culverts will be removed as funding becomes available.”). Rock
 2 armoring (applying rock to road surfaces as stream crossings) for 27 stream crossings
 3 will be treated only if and when funding becomes available. AR-14767.
 4

5 Although the EA reflects a general desire to employ mitigation where feasible,
 6 it does not show a clear, definite commitment of resources for future improvements.
 7 There is no specific funding source provided, no indication of any plans to apply for
 8 funding, and no clear commitment of resources. AR-14787. No guarantee that the
 9 Mission Project mitigation measures will be implemented in a timely manner, or at all
 10 exists. Just as in *Nat’l Wildlife Fed’n*, the record “does not show a clear, definite
 11 commitment of resources for future improvement.” 524 F.3d at 936. Because funding
 12 may never become available and mitigation is uncertain, an EIS should be required.
 13 The Forest Service's broad generalizations and vague references to mitigation measures
 14 do not constitute the detail as to mitigation measures that would be undertaken, and
 15 their effectiveness, that the Forest Service is required to provide.
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20 **2. The EA fails to provide a convincing statement of reasons to**
 21 **support the Forest Service’s FONSI for soil disturbance**
 22 **impacts.**

23 An environmental assessment must provide sufficient evidence and analysis for
 24 determining whether to prepare an EIS or a FONSI. 40 C.F.R. § 1508.9(a). *See also*
 25 *Anderson v. Evans*, 314 F.3d 1006. 1023 (9th Cir. 2002). If an agency decides not to
 26 prepare an EIS, it must provide a ‘convincing statement of reasons’ in the EA to explain

1 why the project's impacts are insignificant. *Nat'l Audubon Soc. v. Butler*, 160 F. Supp.
 2 2d 1180, 1188 (W.D. Wash 2001); *Blue Mountains Biodiversity Project*, 161 F.3d at
 3 1212. The Mission Project EA does not provide a 'convincing statement of reasons' to
 4 explain why the Project's soil compaction impacts are insignificant.

5
 6 In its assessment of soil impacts, the EA explains that there are several ranges of
 7 intensity of impacts: Negligible, Minor, Moderate, and Major. AR-14832. *See also* AR-
 8 14423-24. "Moderate" impacts are when "impacts to soil productivity are
 9 visible/measurable, have up to 50% of the organic layer removed, and have measurable
 10 impacts such as platy soil structure and rutting, but sustains a diverse plant community
 11 multiple years after project implementation." *Id.* "Major" impacts are when "impacts
 12 to soil productivity are visible/measurable, rutting and compaction exceeds R6
 13 standards, complete or near complete loss of organic matter layer, visible erosion and
 14 have measurable impacts decades after project implementation. These types of soil
 15 impacts will not sustain a diverse plant community, but rather a monoculture of non-
 16 native plants or no plant growth at all." *Id.*

17
 18 The EA analysis of the No-Action alternative describes what would occur in the
 19 area without the Mission Project. AR-14836-37. In that scenario, the condition for
 20 compaction, rutting, and puddling will be 4–7% average in each unit. AR-14835. The
 21 EA states that Alternative 1 would "continue the long-term, adverse, major impacts on
 22 soil compaction in the identified areas." AR-14836. Current soil compaction in 14 units

1 exceeds Region 6 soil standards and no action would “do nothing to reduce the long-
2 term legacy compaction found in the project area.” AR-14836.

3
4 The EA reports that under Alternative 2, the chosen Alternative, the compaction,
5 rutting, and puddling will be 7–10% average in each unit. AR-14838, 14843.
6 Considering that 7-10% is significantly higher than 4-7%, it’s safe to say that the
7 adverse compaction, rutting and puddling impacts will be more significant than the
8 impacts that would occur under the No-Action Alternative. In light of the fact that the
9 EA and the soil report describe 4-7% as a “major” impact, it follows that 7-10% average
10 in each unit soil disturbance is also a “major” impact, in fact even more so.
11

12
13 Nonsensically, in its assessment of Alternative 2 and 3 impacts, the EA
14 concludes that, following soil design features, Alternatives 2 and 3 will result in
15 “adverse, short-term, minor detrimental soil compaction, rutting, and puddling from
16 management activities.” AR-14840. A conclusion that soil disturbance that is 4-7% is
17 “major,” while soil disturbance that is 7-10% is “minor” is simply not credible and
18 clearly arbitrary and capricious. Then, even more arbitrarily, in its final conclusion on
19 soil impacts, the EA states: “[f]ollowing soil design criteria, Alternatives 2 and 3 would
20 have long-term, *beneficial, moderate* impacts on soil compaction in the identified
21 areas.” AR-14843 (emphasis added). It is unclear why the EA description of the same
22 impacts changed from “minor” on one page of the EA to “beneficial and moderate,” on
23 a different page of the EA. Regardless, neither description is credible in light of the
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1 fact that the numbers show that the adverse soil compaction impacts increase in
2 intensity when the Mission Project is employed.

3
4 Furthermore, the Forest Service inappropriately relied on an “average” of DSD
5 for the entire Project area for its impact analysis instead of assessing the impacts soil
6 conditions in each “timber unit.” *See infra* Section IV.C. Taking the “average” of all
7 of the units provides a false report of the reality of the situation on the ground. There
8 are significant adverse soil impacts present currently in a number of timber units as
9 described above in Section IV.C of this motion. The fact that some timber units do not
10 have major soil compaction issue should not and cannot erase the fact that other timber
11 units have major soil compaction issues. As explained above in Section IV.C, it’s likely
12 that there will be a number of timber units that exceed the 15% limit following
13 completion of management activities with the Mission Project. Considering that
14 existing conditions reveal that more than 15 % of the area in five different timber units
15 are in a puddled, displaced, or compacted condition now, and 10 other timber units are
16 near that limit, the Forest Service should have assessed the environmental impacts for
17 each timber unit rather than averaging them altogether.

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22 **E. The Forest Plan and the Mission Project Violate the Endangered**
23 **Species Act.**

24 Grizzly bears were listed as a threatened species under the ESA in 1975. SUPP
25 AR-00035. The Forest Service initiated consultation on the Okanogan Forest Plan
26

1 effects on grizzlies when it adopted that Plan in 1989. AR-00981. However, the
 2 population status of grizzly bears and habitat capability in the Northern Cascades
 3 Ecosystem (NCE) and the Okanogan Forest were unknown at that time. AR-00984.
 4 The 1989 Forest Plan Biological Assessment (Biological Assessment) states, “Because
 5 the population status of the grizzly bear on the Forest is yet to be determined,
 6 assessment of the Impacts of resource projects on bears in difficult.” *Id.* Regardless, the
 7 Forest Service determined that the Forest Plan activities were “not likely adversely
 8 affect any listed species or critical habitat.” AR-00985. The FWS concurred.
 9 Declaration of Kristine Akland (Jul. 10, 2020), Ex. 1 (FWS Concurrence Letter,
 10 November 17, 1989).¹ The Forest Plan provides no standards or guidelines relating to
 11 the recovery of grizzly bears and their habitat. *See generally* AR-01605 *et seq.*
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18 ¹ The citations to Exhibits reference exhibits submitted with the Declaration of Kristine M. Akland filed
 19 concurrently herewith. The Court may consider these Exhibits for the purposes of reviewing Alliance’s ESA claims.
 20 *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005); *Western Watersheds Project*, 632 F.3d at 497
 21 (9th Cir. 2011) (Courts may consider evidence outside the administrative record for the limited purposes of reviewing a
 22 claim under the ESA). Also, because the Exhibits were drafted by the Forest Service and FWS, this Court may take judicial
 23 notice of the exhibits as the documents are “not subject to reasonable dispute because [they] . . . can be accurately and
 24 readily determined from sources whose accuracy cannot reasonably be questioned.” FRE 201. Moreover, the Court may
 25 take judicial notice of documents posted on a government website. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 998-99 (9th
 26 Cir. 2010).

1 The FWS promulgated the Grizzly Bear Recovery Plan (Recovery Plan) in 1982,
 2 revising it most recently in 1993. SUPP AR-00033. The 1993 Recovery Plan designates
 3 “recovery zones” and prescribes forest management measures within these zones to
 4 protect and facilitate the survival and reproduction of grizzly bears. SUPP AR-00059.
 5 Implementation of the Recovery Plan is the responsibility of the Federal and State
 6 management agencies where the species occurs. *Id.*

7
 8 The Recovery Plan established the North Cascades Grizzly Bear Recovery Zone
 9 in north-central Washington which includes most of the Okanogan National Forest, and
 10 all of the Project area. SUPP AR-00056, 00207; AR-14464

11
 12 Verified grizzly tracks were documented in 1989 and 1990 (Almack et al.
 13 1991). Additionally, habitat research confirms that the North Cascades
 14 evaluation area offers sufficient amounts of quality habitat to warrant
 15 grizzly bear recovery in the area (Servheen et al. 1991). Upon
 16 recommendation by the NW Ecosystem Management Subcommittee, [the
 17 Interagency Grizzly Bear Committee] approved the North Cascades
 18 evaluation area for grizzly bear recovery efforts. Specific boundaries of
 19 the North Cascades grizzly bear recovery zone are to be determined by
 20 the end of 1993 by an interagency working group.

21 SUPP AR-00055-56.

22 In 1997, the FWS supplemented the Recovery Plan with the “North Cascades
 23 Ecosystem Recovery Plan Chapter” (NCE Supplement). SUPP AR-00207. The
 24 Supplement states: “An analysis of current habitat information for the NCE and
 25 estimated grizzly bear densities in similar habitats indicate that the ecosystem will
 26 likely support [200-400] bears. . . . Given the present, very small population of grizzly

1 bears in the NCE, the initial target for human-induced mortality is zero. SUPP AR-
2 00210-211. A “priority action” for the NCE is to “implement the Interagency Grizzly
3 Bear Guidelines.” *Id.* 212. To date, however, the Recovery Plan for the NCE has not
4 been implemented.
5

6 In 2014, the FWS reaffirmed that the NCE grizzly bear warrants uplisting from
7 threatened to endangered under the ESA. 79 Fed. Reg. 72450 (Dec. 5, 2014). The
8 change in listing status is precluded only by lack of funding. Akland Dec., Ex. 2
9 (Memorandum of Understanding (April 27, 2014)) at 2. That same year, the FWS,
10 Forest Service, National Parks Service (NPS) and Washington Department of Fish and
11 Wildlife entered into a Memorandum of Understanding (MOU) regarding the
12 “cooperative development of the Environmental Impact Statement for the North
13 Cascades Ecosystem Grizzly Bear Restoration Plan.” *Id.* The Agencies again noted that
14 the area “is capable of supporting a self-sustaining grizzly bear population” but that
15 grizzly bears in the NCE “are the most at-risk grizzly bear population in the United
16 States today.” *Id.* at 2.
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21 In 2017, the agencies published a Draft Grizzly Bear Restoration Plan and
22 Environmental Impact Statement which proposes to release between 20-200 grizzly
23 bears into the North Cascade Ecosystem to attempt to meet the recovery goal of 200
24 bears. Akland Dec., Ex. 3 (Draft Grizzly Bear Restoration Plan Environmental Impact
25
26

Statement (January 2017)) at 3. On July 7, 2020 the Department of Interior “discontinued the proposal.” Akland Dec., Ex. 4 (Notice of Termination (July 7, 2020)).

1. The Forest Service must reinitiate consultation on the Okanogan National Forest Plan.

When new information reveals that a forest plan may affect a listed species or critical habitat in a way not previously considered, the Forest Service and FWS have a duty to reinitiate consultation. *Cottonwood Environmental Law Center v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015). In *Cottonwood*, the Ninth Circuit found that the agencies were required to reinitiate consultation pursuant to 50 C.F.R. § 402.16(b) on the effects of the revised lynx critical habitat consultation. *Id.*

[The] FWS discovered that the original critical habitat designation had been tainted by an ethical lapse in its own administrative ranks. Re-evaluation of the data generated a drastically different result that justified vast designation of previously unprotected critical habitat. These new protections triggered new obligations. The Forest Service cannot evade its obligations by relying on an analysis it completed before the protections were put in place.

Id.

The Court held that the Forest Service was required to reinitiate consultation on all forest plans which govern forests with lynx critical habitat; finding that reinitiation in that circumstance “comports with the ESA’s statutory command that agencies consult to ensure the ‘continued existence’ of listed species.” *Id.* at 1087(internal citation omitted). To hold otherwise would “relegate the ESA. . . to a static law that

1 evaluates and responds to the impact of an action before that action takes place, but
2 does not provide for any further evaluation or response when new information emerges
3 that is critical to the evaluation.” *Id.* at 1088.

4
5 Similarly, in *Hoopa Valley Tribe v. NMFS*, 230 F.Supp.3d 1106, 1131 (N.D.
6 Cal. 2017), the court held that the reinitiation of formal consultation for the operation
7 of the Klamath Irrigation Project was required. *Id.* at 1130. There, consecutive drought
8 years caused variations in operations of a dam and changes in hydrologic conditions
9 that resulted in a higher rate of disease in Coho salmon that was not analyzed at the
10 time the agencies consulted. The Court found that this new information triggered the
11 requirement to reinitiate formal consultation under 50 C.F.R. § 402.16(b). *Id.*

12
13 Here, new data and information exists that may affect the analysis regarding
14 Forest Plan effects on grizzly bears and therefore triggers the Agencies’ requirement to
15 reinitiate formal consultation. Since the 1989 consultation on the Forest Plan, several
16 new factors have come to light in regards to grizzly bear recovery.

17
18 First, and most notably, it was determined by the Agencies that grizzly bears are
19 present in the North Cascade Ecosystem, specifically in the Okanogan, and the area
20 provides sufficient habitat to maintain and recover between 200 and 400 grizzly bears,
21 as more fully detailed above. SUPP AR-00209; 00055-56. Additionally, bear
22 management units (BMU) have been designated in the Forest, two of which occur on
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1 the Project Area: Upper Twisp BMU and Libby BMU. AR-15610. In 2015, a grizzly
2 bear was sighted 60 miles north of the Project area. AR-01164.

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4 As the Forest Service conceded in 1989, “[b]ecause the population status of the
5 grizzly bear on the Forest is yet to be determined, assessment of the impacts of resource
6 projects on bears is difficult.” AR-00984. However, as laid out above, the population
7 status of the grizzly bear on the Forest has been determined through the Recovery Plan
8 processes. Additionally, the FWS’ determination that the NCE grizzly bear population
9 warrants uplisting and the FWS and NPS’s former plan to release grizzly bears into the
10 NCE suggests that the Agencies are fully aware of the population’s status. This new
11 information- that grizzly bears are present on the Okanogan; that the Forest is now
12 located within a Recovery Zone; that the area contained sufficient habitat to maintain
13 and recover 200-400 grizzlies - is information not previously known during the 1989
14 consultation and may reveal “effects of the [Forest Plan] that may affect [grizzly bears]
15 in a manner or to an extent not previously considered.” 50 C.F.R §402.16(b). As noted
16 above, “any possible effect” satisfies the low “may affect” standard under the ESA.
17 *Kraayenbrink*, 632 F.3d at 496.

18
19 In addition, since the 1989 consultation, it has been repetitively found that roads
20 “pose the most imminent threat to grizzly bear habitat today.” SUPP AR-00064. In
21 1994, FWS concluded, “The density and management of roads is one of the most
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1 powerful tools available to balance the needs of people with the needs of bears (revised
2 Draft Recovery Plan).” FWS-39750.

3
4 The Forest Service acknowledges that high road density directly impacts the
5 ability of an area to support grizzly bears, leading to underutilization of high-quality
6 habitats. AR-15293. As disclosed in the Project Biological Assessment, “Road
7 avoidance leads to underutilization of habitats that are otherwise high quality (Wisdom
8 et al, 2000). . . . Human access facilitated by roads and trails increases the potential for
9 poaching, collisions with vehicles, and chronic negative human interactions.” *Id.* The
10 Biological Assessment discloses that in 2002 and 1996, it was found that “Roads reduce
11 habitat quality for large carnivores as a result of noise, avoidance of human habitat
12 fragmentation and convert areas to non-habitat.” *Id.* Mace et al (1996) establishes that,
13 “A properly implemented programme would minimize road density and traffic volume
14 in watersheds having highly preferred habitats. . .” SUPP AR-00277.

15
16 Notably, the 1993 Recovery Plan concluded that roads “pose the most imminent
17 threat to grizzly bear habitat today.” SUPP AR-00064. Similarly, the Interagency
18 Grizzly Bear Committee (IGBC)² recognizes the importance of secure areas *and* low
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24 ² The IGBC was formed in 1983 to help “ensure recovery of viable grizzly bear populations.” *See*
25 <http://igbconline.org/about-us/> (last visited June 30, 2020). The IGBC is an interagency committee consisting of
26 representatives from the Forest Service, NPS, FWS, the Bureau of Land Management, the U.S. Geological Survey and

1 road density to grizzly bears and created a Taskforce to “provide a consistent approach
 2 to motorized access management between and within grizzly bear ecosystems.” Akland
 3 Dec., Ex. 5 (Interagency Grizzly Bear Committee Taskforce Report- Grizzly
 4 Bear/Motorized Access Management (July 29, 1998)) at 1. The 1998 revised IGBC
 5 Taskforce Report concluded that open road density, total motorized rout density, along
 6 with the presence of cores areas are “important elements in the management of human
 7 access within grizzly bear recovery zones.” *Id.* The Taskforce recommends: 1)
 8 delineating the analysis area to that of the approximate size of annual home ranges of
 9 an adult female grizzly bear; 2) develop access route density maps and density
 10 calculations for *all motorized access routes* (open roads and total roads); and 3)
 11 establishment of core areas in all subunits; and 4) define acceptable levels of motorized
 12 access. *Id.* at 4-5.

13
 14 The Forest Plan does not provide a road density standard or objectives to protect,
 15 support or maintain grizzly bears and their habitat. However, since the 1989
 16 consultation, the Agencies themselves have come to recognize impacts that roads have
 17 on the ability of an area to support grizzly bears and the negative effects roads have on
 18 individual bears. Most notably, the IGBC, in which the Forest Service and FWS are
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representatives of the state wildlife agencies of Idaho, Montana, Washington and Wyoming. *Id.* The IGBC helps implement the Recovery Plan. *Id.*

1 members, emphasizes the importance of minimizing open and total road density.
2 Akland Dec, Ex 5 at 1, 4-5.

3
4 If the basis or baseline for the FWS's jeopardy or no jeopardy opinion is no
5 longer appropriate, the agencies must reinitiate consultation to ensure the continued
6 existence of that species. 16 U.S.C. § 1536(a)(2)(4). Similarly, if the status of a species
7 changes due to factors not consulted on so the basis or baseline for a "not likely to
8 adversely affect" opinion is no longer appropriate, the agencies must reinitiate
9 consultation to ensure that the action does not adversely affect a listed species and
10 possibly jeopardize its continued existence. *Gifford Pinchot Task Force*, 378 F.3d at
11 1077. Here, the baseline of the Forest Service and FWS's "not likely to adversely
12 affect" opinion is no longer valid because "the population status of grizzly bears on the
13 forest [*has*] been determined." AR-00984. The Forest Service and FWS did not know
14 or understand the effects the Forest Plan would have on grizzly because it did not know
15 its status at the time of consultation. Since then, the grizzly bear's status has been
16 determined and new science has emerged that strongly demonstrates that roads
17 negatively impact grizzly bears and emphasizes the importance of minimizing road
18 densities. The above factors qualify as "new information" that was not available at the
19 time of the 1989 consultation and is critical to the evaluation of the Forest Plan's effects
20 on grizzly bears. Therefore, the Agencies are obligated under 50 C.F.R. §402.16(b) to
21 reinitiate formal consultation for the Okanogan National Forest Plan. *Hoopa Valley*,

230 F.Supp.3d at 1131; *Gifford Pinchot*, 378 F.3d at 1077. To do otherwise would
relegate the ESA to a static law that does not provide any further evaluation or response
when new information emerges that is critical to the evaluation. *Cottonwood*, 789 F.3d
at 1088.

**2. The Forest Service’s failure to disclose and analyze the
Project’s impacts on road density is arbitrary and capricious
and a violation of the ESA.**

Under the consultation process, the Forest Service prepares a biological
assessment that evaluates the impacts of its proposed actions on listed species. 16 U.S.C.
§ 1536(c). If the Forest Service determines the action is likely to adversely affect a
listed species, formal consultation with FWS is required. 50 C.F.R. § 402.14(a) and
(b)(1). At the conclusion of formal consultation, FWS must issue a biological opinion
detailing “how the agency action affects the species” and whether the action is “likely
to jeopardize the continued existence” of the species. 16 U.S.C. §§ 1536(a)(2),
(b)(3)(A); 50 C.F.R. § 402.14(g). If FWS reaches a “no jeopardy” determination, it may
provide for incidental take of the species. 16 U.S.C. § 1536(b)(4). If the Forest Service
determines that the action “may affect, is not likely to adversely affect” the listed
species, the FWS may issue a letter of concurrence. 50 C.F.R. § 402.14(b)(1).

Through Section 7 consultation, the Forest Service is required to use “the best
scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The biological
assessment must include “the view of recognized experts on the species at issue” to

1 determine whether or not formal consultation is required. 50 C.F.R. § 402.12(f)(2). The
 2 Forest Service acts arbitrarily or capriciously if it entirely fails to consider an important
 3 aspect of the problem, or offered an explanation either contrary to the evidence before
 4 the agency or is so implausible as not to reflect either a difference in view or agency
 5 expertise. *Motor Vehicle Mfs.*, 463 U.S. at 42.
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7
 8 Here, the Forest Service failed to consider the impacts to grizzly bears from road
 9 densities in the Project area and failed to disclose road density calculations to the public.
 10 Forest Service wildlife biologist Ann Glidden discloses:
 11

12 The Mission analysis area is heavily roaded, but opportunities for long
 13 term road closures are precluded by the management of the area for timber
 14 production, grazing and recreation, and need for access for fire
 15 suppression. I didn't see a value in trying to create large unroaded areas
 16 (core), given the timber, fire and rec use.

17 AR-08072.

18 As set forth above, it is well established that road density is an "important aspect
 19 of the [grizzly bear recovery] problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. It is
 20 undisputed that the best available science requires the Forest Service analyze the
 21 Project's road density impacts on grizzly bears. The IGBC has established an "approach
 22 to motorized access management between and within grizzly bear ecosystems." Akland
 23 Dec., Ex. 5 at 1. Here, however, the Forest Service completely fails to consider road
 24 density impacts on grizzly bears and does not apply any of the IGBC recommendations.
 25

26 AR-15293-4. The Forest Service does not disclose an analysis of open road or total

1 road density within the female home range or any analysis unit. *Id.* In fact, no road
 2 density is disclosed in the context of grizzly bears in the Biological Assessment. Thus,
 3 without an analysis regarding the effects of open and total road densities prior to and
 4 following project implementation on grizzly bears, the Forest Services' effect analysis
 5 is inadequate because it fails to analyze an important aspect of the problem.
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7
 8 The Forest Service's failure to engage in this analysis or application here is a
 9 failure to fulfill its duty to evaluate the effects of the Project on grizzly bears as required
 10 by the ESA. The Biological Assessment offers no explanation as to why it deviates
 11 from its own established approach for motorized access effects on grizzly bears. Nor
 12 does the Biological Assessment articulate a rational connection between the undisputed
 13 best scientific information available, the Forest Service disclosure that "the Mission
 14 analysis area is heavily roaded," and the determination that the Project "will not likely
 15 adversely affect grizzly bears." In sum, Forest Service failed to apply the best available
 16 science and failed to consider an important aspect of the problem. Therefore, the Forest
 17 Service's "not likely to adversely affect" determination is arbitrary and capricious and
 18 violate the ESA. 16 U.S.C. § 1536(a)(2); *Motor Vehicle Mfrs.*, 463 U.S. at 43.
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22 V. RELIEF

23
 24 Based on the above described violations of law, setting aside the Final Decision
 25 and FONSI for the Mission Project (July 20, 2018) is warranted. Vacatur is the
 26 presumed remedy when an agency's action is found to be arbitrary, capricious, and/or

1 not in accordance with the law. *See* 5 U.S.C. § 706(2)(A) (“The reviewing court shall
 2 ... hold unlawful and set aside agency action, findings, and conclusions found to be...
 3 arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with
 4 law”).

6 For purposes of 5 U.S.C. § 706, the phrase “set aside” means to vacate. *See, e.g.,*
 7 *Checkosky v. S.E.C.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (“Setting aside means vacating;
 8 no other meaning is apparent”). In turn, the APA’s use of the word “shall” indicates
 9 that vacatur is the presumed, normal, or default remedy for improper agency action.
 10 *See, e.g., Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638,
 11 654 (9th Cir. 2007) (Under the APA, the normal remedy for an unlawful agency action
 12 is to ‘set aside’ the action. In other words, a court should vacate the agency’s action and
 13 remand to the agency to act in compliance with its statutory obligations). *See also*
 14 *Klamath-Siskiyou Wildlands Center v. National Oceanic and Atmospheric*
 15 *Administration*, 109 F. Supp. 3d 1238, 1241 (N.D. Cal. 2015) (“When a court finds an
 16 agency’s decision unlawful under the Administrative Procedures Act, vacatur is the
 17 standard remedy”).

22 Vacating an agency’s decision has the retroactive effect of restoring the status
 23 quo as if the decision had never been made. For example, when a Record of Decision
 24 has been vacated, the agency must then proceed as if it had never issued the ROD in
 25 the first place. *See Olympic Forest Coalition v. U.S. Forest Serv.*, 556 F. Supp. 2d 1198,
 26

1 1205 (W.D. Wash. 2008) (where the Forest Service’s 2004 Record of Decision was
2 vacated, the agency “was required to conduct [its new NEPA] analysis as if the . . .
3 ROD had never been adopted”). *See also Env’tl Def. v. Leavitt*, 329 F.Supp. 2d 55, 64
4 (D.C. Cir. 2004) (holding that while EPA previously complied with a date-certain
5 deadline for promulgating BART rules, vacatur of those rules “presented a situation
6 wherein EPA had failed to promulgate regulations in accordance with the express
7 deadline”).
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10 VI. CONCLUSION

11
12 Plaintiff requests that the Court set aside the Mission Project Final Decision and
13 FONSI pursuant to 5 U.S.C. § 706(2)(a) and 16 U.S.C. §1540(g) and enjoin
14 implementation of the Project. Plaintiff seeks a declaratory judgment, injunctive relief,
15 an award of costs and expenses of suit, including attorney and expert witness fees
16 pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412 and such other relief as
17 this Court deems just and proper.
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1 Dated this 10th day of July, 2020.

2 Respectfully submitted, by:

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